

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,296

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social Welfare denying her coverage under medicaid for an "Alpha Talker", which is a prosthetic speech device. The issue is whether this is a covered item under the pertinent medicaid regulations.

FINDINGS OF FACT

The facts are not in dispute. The petitioner is a forty-three-year-old woman who suffers from cerebral palsy. She lives in a group home for developmentally disabled adults. Because of a severe speech disorder the petitioner has been prescribed a touch talking device that would enable her to communicate effectively and understandably.

The Department does not dispute the petitioner's evidence (see attachments to Petitioner's Memorandum) that the device in question has been prescribed by the petitioner's physician, a speech language pathologist, and the petitioner's social worker, and that the device is medically necessary to enable the petitioner to communicate effectively. The Department also does not appear to dispute that such devices are considered "prostheses" by medical and other professionals in the field.

The Department also does not dispute that in a recent fair hearing (No. 13,170) it reported to the Board that it had settled a virtually identical case by agreeing that a similar speech device was covered under medicaid as a "prosthetic device". The Department does not allege that the instant matter is distinguishable from the previous case either by the type of device sought or by the circumstances of the recipient seeking it.

ORDER

The Department's decision is reversed.

REASONS

Speech devices are not specifically included (or excluded) under the medicaid regulation's "all-inclusive" list of "durable medical equipment" contained in Medicaid Manual (MM) § M841. However, § M844 of those regulations, under "Prosthetic Devices", provides as follows:

Prosthetic devices (other than dental) and repairs to these devices are covered when medically necessary and ordered by a physician.

Payment for prosthetic devices requires prior authorization be granted by the Medicaid Division. The prescribing physician must submit a written request with pertinent diagnostic and clinical data to justify the request.

Payment is made at the lower of charges or the Medicaid rate on file.

When a device is furnished to an inpatient or outpatient of a hospital, reimbursement will be made only to the hospital.

As noted above, the Department does not dispute (or at least presented no evidence or argument to the contrary) that speech devices like the one prescribed for the petitioner are looked upon and defined as "prostheses" by physicians and professionals in the field of speech language pathology. Nothing in § M844 indicates that "prosthetic devices" are limited to artificial limbs or other attached body parts. Absent any regulation, argument, or showing to the contrary, it must be concluded that the speech device sought by the petitioner is a "prosthetic device" covered under § M844, supra.

Moreover, the Department does not dispute that in a recent fair hearing, which does not appear to have been distinguishable from the facts or circumstances of this one, the Department granted the petitioner in that case medicaid coverage for a similar speech device as a "prosthetic device" under § M844. The Department's only argument regarding that fact is a reference to Vermont Rules of Evidence No. 408, which provides as a general matter that settlement negotiations and "compromises" are not admissible as evidence.⁽¹⁾

This argument represents not only an egregious misreading of that rule of evidence, and a miscomprehension of the policy behind it, but also a disconcerting heedlessness of basic administrative law and constitutional protections.

V.R.E. 408 specifically provides that evidence "otherwise obtainable from independent sources" is not inadmissible. The purpose of this provision is to prevent otherwise-obtainable evidence from being excluded "merely" because it was part of "compromise negotiations". See id., Reporter's Notes. In the case in question the Department communicated its settlement, and the basis for it, to the hearing officer--presumably, so that the Board would request that the petitioner in that case withdraw his appeal (which is what the Board and the petitioner did in that case). The Department gave no indication, then or now, that the "settlement" of that case was based on factors other than its interpretation of its own regulations. In the instant case, it was the hearing officer who brought the previous case to the attention of the parties. Thus, clearly, V.R.E. 408 does not prohibit the Board's consideration of the action of the Department in that prior case.

More troubling, however, is the Department's apparent disregard of the basic administrative and constitutional requirement "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single man, family, or set of men, who are a part only of that community . . ." Vermont Constitution, Chapter I, Article 7; see also 14th Amendment to the U.S. Constitution. The Department's position begs the question of whether a governmental agency that administers public benefits can legally "compromise" any individual case based on anything other than applicable law and regulations. Consistency, fairness, and evenhandedness in the administration of government agencies are the essence of "equal protection under the law". It is bad enough that the Department in this case, without rationale or explanation, has denied the petitioner herein the same benefit it recently granted another similarly-situated individual. It is outrageous, however, for the Department to suggest (see Department's letter of May 11, 1995) that the petitioner's counsel in this matter has somehow acted inappropriately by insisting that her client receive the same benefit the Department recently provided to that other recipient. The hearing officer and the Board hope and assume that the Department's position in this matter is simply unthinking, rather than an indication that the Department believes it can secretly administer the medicaid program on an ad hoc and arbitrary basis.

At any rate, inasmuch as the uncontroverted evidence in this case overwhelmingly demonstrates that the device in question is a prosthetic device within the "plain meaning" of § M844, *supra*, and absent any language in the regulations specifically excluding such a device from coverage, the Department's decision in this matter should be reversed.⁽²⁾

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1. V.R.E. 408 provides as follows:

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, the invalidity of, or the amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations, including mediation, is likewise not admissible. This rule does not require exclusion of any evidence otherwise obtainable from independent sources merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

2. Inasmuch as it is concluded that the device in question is covered under § M844 it is unnecessary to consider the petitioner's arguments regarding whether coverage is otherwise mandated by federal regulations.